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A warmer way of disputing: Mediation and conciliation

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A Warmer Way of Disputing*: Mediation and Conciliation

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The decade of the 1970s has provided the setting for a remarkable series of developments that are changing the way in which Americans settle disputes. A variety of dispute settlement institutions and practices have emerged as alternatives to the formal, adversary relations that characterize adjudication. The emergence of conciliation and mediation centers and the extension of conciliation and mediation to the settlement of disputes heretofore left to other processes are, perhaps, the most dramatic of these developments. This phenomenon represents a return, in part, to the more modest modes of dispute settlement of an earlier epoch.

With the support of a variety of agencies and organizations, including the Law Enforcement Assistance Administration of the Federal Department of Justice, state and local governments, the American Arbitration Association, the American Bar Association and various private foundations, mediation, conciliation and neighborhood justice centers have burgeoned since the early 1970s. Disputes involving persons in on-going relationships (spouses, parents and children, neighbors, friends, landlords and tenants, business associates) and conflicts which would be treated as minor criminal offenses in the regular court system are referred to these centers by the police, court clerks, judges, prosecutors, a variety of community organizations, and by disputants themselves.[1]

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* "From pro's and con's they moved to a warmer way of disputing." *Don Quixote* Part I, Book III, Chapter X.

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1. Descriptions of various community dispute resolution programs employing techniques of mediation and conciliation can be found in the Report of the Citizen Dispute Resolution Workshop (June 1976) (P. Wahrhaftig, ed., Pennsylvania Pretrial Justice Program, American Friends Service Comm.); D. McGillis and others, Neighborhood Justice Centers, An Analysis of Potential Models (Abt Associates, Inc., Cambridge, Mass. June 6, 1977); W. Goldbeck, "Mediation: An Instrument of Citizen Involvement," 30 The Arbitration J. 241 (1975); Northam and Kirtland, "How to Rid the Judicial System of Unnecessary Expenses and Delays: Mediation is the Answer," Learning and the Law (Fall 1974); P. McMillan, "The New Way to Settle Things," New York News Magazine (August 31, 1975) at p. 5; S. Conn and A. Hippler, "Conciliation and Arbitration in the Native Village and the Urban Ghetto," 58 Judicature 228 (1974).

The Neighborhood Justice Centers Report, prepared for the Law Enforcement Assistance Administration, provides a useful and convenient analysis of six of these centers in terms of the nature of the community served (ranging from 22,000 to three million people); sponsoring agencies; project locations (storefronts, prosecutor's office, court

Conciliation and mediation agencies have also been introduced to deal with community disputes transcending the interests of one or two individuals and affecting whole neighborhoods. These disputes may include such problems as the proposed building of a highway or a proposed reduction in neighborhood services.[2] Recently proposals have been made for the use of mediation in settling environmental disputes involving such issues as the building of a power plant or dam or the time schedule to be allowed to an industry for abating an environmental nuisance.

And, together with recent changes in the substantive law of divorce in many states, conciliation and mediation have been expanded to deal with an increasing variety of marital and post-marital conflicts.

New Processes, New Goals

The movement toward greater use of mediation and conciliation in community "dispute resolution centers" and "neighborhood justice centers" and the expanded use of these processes to deal with expanded categories of disputes must be seen in the context of a much larger picture. This picture includes the extended use of arbitration and ombudsmen; the diversion of a variety of juvenile and nominally criminal cases to a variety of community agencies; the growth and expansion of small claims courts; the emergence of medical malpractice tribunals designed to divert certain suits from the formal court system; the development of specialized courts with full jurisdiction over all civil and criminal disputes related to a particular subject matter, such as housing; the emergence of consumer complaint and consumer protection agencies; and the assumption by newspapers and magazines of the task of printing and investigating complaints about government agencies, companies and other institutions.[3]

Certain of these changes have taken place not only in urban and rural society at large but also within so-called "total institutions" such as schools, prisons, and housing units where bargaining, negotiation, democratic assembly, ombudsmen, mediation and arbitration have been introduced to divert some disputes from the formal civil and criminal courts and to deal with other conflicts that were previously ignored or dealt with by administrative fiat.[4]

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house, etc.); criteria for allocation of cases to these centers (generally on-going relationships; some others, such as disputes involving bad checks); referral sources; intake procedures; resolution techniques (fact-finding, conciliation, mediation, arbitration); enforceability of case resolution; nature of staff and staff training; final disposition of cases; procedures for determining the effectiveness of in-center resolution; and costs of operation of centers.

2. The New Jersey Office of Dispute Settlement, Department of Public Advocate is one such agency.

3. Many of these alternatives are discussed in Frank Sander's "Varieties of Dispute Processing," 70 F.R.D. 111 (1976). Professor Sander's article provides the most useful and thoughtful summary to date of the costs and benefits of developing and expanding alternative processes. The article is one of several addresses delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 1976) and reproduced in 70 F.R.D. Footnotes to Professor Sander's article provide citations to much of the important literature in the field of alternative processes for dispute settlement. See also Thomas Ehrlich's and Jane Frank's important and provocative monograph Planning for Justice (Aspen Institute for Humanistic Studies, 1977).

4. See, for example, "Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority," 81 Yale Law J. 726 (1972).

Not only have alternative processes for settling disputes been substantially expanded, but innovations have taken place within pre-existing dispute settlement institutions. Final offer arbitration, the utilization of high-low contracts in tort litigation, the deformalization of the setting for adjudication, and improvement of collection procedures in small claims courts, for example, have altered the way in which some arbitration and adjudication are carried out.[5]

In addition, there have been changes in attitudes about law and litigation, and changes in substantive law which, to some extent, have reduced the number of certain types of claims coming to formal courts. These changes include a recognition in some quarters of the need for preventive lawyering, a growing awareness that individuals may themselves be able to take steps to avoid litigation by taking preventive measures, and changes in substantive law that eliminate certain categories of cases from litigation (no-fault auto insurance, decriminalization) or that reduce substantially the amount of in-court time needed to settle certain categories of disputes (introduction of the breakdown of the marriage principle and the simplification of probate procedures for estates worth less than a particular amount).

Finally, there have been significant changes in the *goals* of dispute settlement that have dramatically altered the impact of particular modes of dispute settlement on individual parties to the dispute as well as on the more general society. The growth of consumer complaint bureaus, ombudsmen offices, and specialized tribunals such as housing courts has facilitated the treatment of generalized and institutionalized problems rather than simply the problems of particular disputants. A housing court, for example, may be able to attack pervasive problems within a housing unit that affect a large number of tenants. The goal of the dispute settlement institution, like that of some Soviet courts, is expanded from treating individual problems to treating problems shared by others.[6] Traditional adjudication is peculiarly unsuited to dealing with the type of "polycentric" problem that often characterizes conflicts within housing units and other institutions.

Mediation centers in particular have been developed to deal with dimensions of dispute settlement that have been ignored by more formal courts. Victims of crimes have long been neglected parties in criminal cases in the United States, but they are now receiving increased attention in mediation centers which often have a special mandate to assist victims and to focus on persons rather than acts. This same concern has spilled over, to some extent, into the formal courts through the introduction of victim compensation schemes and the use of penalties that involve restitution to the community.[7]

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5. Massachusetts Acts, 1973, ch. 1078 (limiting the arbitrator's decision to a choice between the final offers of the two parties); L. Finz, "The Hi-Lo Contract, A Trial by Chance," 48 N.Y. State Bar J. 186 (April 1976); W. Stevens, "Detroit Marxist Presses Class Struggle as Judge," New York Times, March 10, 1973 at p.27; "Program Set to Help Plaintiffs Collect Small Claims," New York Times, August 29, 1977 at p. 28.

6. H. Berman, "The Educational Role of the Soviet Court," 21 Int'l and Comp. Law Quarterly 81 (1972); D. Milton, "The New York City Housing Part: New Remedy for an Old Dilemma," III Fordham Urban Law J. 267 (1975); J. Maslow, "Judge Paul Garrity and His Boston Marathon," Juris Doctor (March 1974) at 44. See also Ehrlich and Frank, op. cit. note 3.

7. W. McDonald, "Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim," 13 The American Criminal Law Rev. 649 (1976).

Too little is known about the reasons why people bring disputes to courts or other dispute settlement agencies. But it is now generally recognized that the stated reason is not always the real reason. Mediation centers have emerged in part as a result of the recognition that an individual may simply want an opportunity to tell the story about his or her life condition, of which the stated dispute is only a part. Therapy and catharsis, rather than an attempt to arrive at some "truth," becomes the goal of dispute settlement.

As noted above, conciliation and mediation have been expanded in the area of marital disputes. Conciliation, of course, traditionally has been available on a voluntary basis for persons seeking assistance in solving marital conflicts. Family members, clergymen and marriage counselors often serve as conciliators. Recent changes in the substantive law of divorce in many states of the United States (from fault-based criteria to a theory of breakdown of the marriage) have in some instances been accompanied by requirements that conciliation procedures be pursued before a divorce decree can be granted. The evidence to date suggests that such compulsory conciliation, coming at a relatively late point in the breaking down of the union, has not been an effective vehicle for repairing the marriage.[8]

Conciliation and mediation may, ironically, be more effective in dealing with settlement agreements and disputes that arise after the decision to divorce is made. No-fault divorce may minimize the acrimony that often accompanies contested, fault-based divorces and parties may be more willing to work together in negotiating terms for the future. The American Arbitration Association has recently instituted a Family Dispute Service that, among other things, assists, through mediation, in the negotiation of agreements arising out of broken marriages.[9]

Why Mediation in America?

Three questions seem of particular importance in understanding the movement toward greater use of conciliation and mediation (and other processes) in the United States. Why, in the mid-1970s, are these processes attracting so much attention? How does society determine which disputes are to be allocated to these processes? Why has the United States delayed so long in exploring alternatives to formal adjudication?

The answer to the first question is, of course, critical in any attempt to evaluate the success of conciliation, mediation and other alternative processes. It is also intriguingly complex because the movement has developed, I believe, in response to a number of quite separate and distinct factors and forces that have only recently come together to establish an atmosphere in which alternative dispute settling processes are seen as necessary and desirable. These include inaccessibility of formal courts to the poor and much of the middle class; the costs and delays inherent in the formal court system even when one has access to it; a growing concern about the proliferation of laws and the accompanying mystery and legalese that obscures what one

8. D. Maddi, "The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage," 13 J. of Family Law 495 (1973-74).

9. L. Van Gelder, "Top U.S. Arbitrators in Labor Strife Turn to Marriage Wars," New York Times, March 3, 1977 at p. 39.

expects may be rather simple phenomena; and the reluctance of state legislatures to reform obviously inefficient judicial systems.

Added to these factors and forces has been the development in the 1960s and 1970s of an important theoretical literature that has suggested that the formal, due process, adjudicatory system of dispute settlement may not always be the most satisfactory way to solve certain types of disputes and that this formal process may, in many cases, focus on the wrong questions. This literature has suggested that certain types of disputes are simply inappropriate for certain processes and has asked whether society might not be better served by dispute settlement processes that unearth and deal with underlying social problems rather than the mere symptoms of those problems.[10]

It is unlikely, however, that these various factors would, by themselves, have been sufficient to give the movement toward alternative dispute settlement the momentum and force it has. Alternative dispute settlement agencies have emerged, I believe, because there is, in the United States, a growing feeling of dissatisfaction with, and a more critical attitude towards, professionals, an increasing consciousness that America and Americans must recapture a sense of "community," and a growing feeling that individuals must play a more active role in determining how their lives are to be lived. Mediation centers and similar agencies are, to a large extent, a response to these concerns.

The last several years have seen a tremendous outpouring of newspaper and magazine articles about what is regarded as "a plague of lawyers."[11] This outpouring is almost as great as the number of recent books and articles that attempt to "de-mystify" the law and medicine or urge that such "demystification" take place.[12] Such books as *How to Avoid Probate* and *Woman's Body—An Owner's Manual* symbolize the movement. Richard Goodwin's lament in 1974 about the decline of community in America[13] could well be regarded as the rallying cry for the recent development of neighborhood crime watches, little city halls, neighborhood health centers and mobile medical units as well as the development of community courts. Finally, the movement toward less formal procedures for settling disputes and in health care cannot, perhaps, be appreciated without understanding what may be termed the "small is beautiful" syndrome which eschews bigness for the sake of bigness.

These movements, as the above suggests, are generalized and are not related solely to law and how people are treated in courts. Analogous movements within the field of medicine provide interesting perspectives on the phenomenon.

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10. Lon Fuller addresses the question of "What problems can be solved by some form of adjudication?" in "Collective Bargaining and the Arbitrator," 1963 Wisconsin Law Rev. 3. See also L. Fuller, "Mediation—Its Forms and Functions," 44 S. Calif. Law Rev. 305 (1971).

11. J. Auerbach in Harper's, October 1976 at 37; E. Dickinson, "Lawyers Proliferate and Prosper," New York Times, January 25, 1976 at p. 7.

12. M. Siegel, "A Judge Calls for Open Courts to Demystify Judicial Process," New York Times, March 13, 1977. M. Samuel and H. Bennett, The Well Body Book (1977) ("a book that de-mystifies the practice of medicine . . . ," W. Goodheart, Introduction).

13. "Reflections: The American Condition," New Yorker, January 28, 1974 at p. 36.

There has been a recognition that hospitals, like courts, take on a bureaucratic life of their own and that bureaucratic goals (minimizing risks of malpractice suits, preserving the image of "professionalism," facilitating child delivery for the sake of the doctor) and bureaucratic inertia often take priority over the concerns of the patient, just as courts often sacrifice due process considerations to bureaucratic goals relating to case management.

There is also a rising concern about the nature of the medical profession—its lack of interest in preventive medicine because the intellectual and financial rewards are not great enough, its historic opposition to a national health insurance program, the practice of unnecessary surgery and unnecessary hospitalization, increasing medical costs and physicians' incomes.

Despite the opposition to change and despite the professional and bureaucratic inertia, however, changes have occurred in the field of medicine. Nowhere is it more striking than in the area of childbirth.[14] Responding to intense pressure from women—and men—for greater involvement in what they regard as a natural act (giving birth) rather than a medical crisis, and responding to demands for greater involvement by wives and husbands in determining the processes through which birth is to take place, alternatives to doctor-assisted, hospital-situated births have developed. The result has been an increased use (and legalization) of nurse-midwives in hospital deliveries, increased doctor-assisted home deliveries, development of childbearing centers physically separated from hospitals, a gradual shift by hospitals toward more homelike "birth rooms," attendance of fathers at deliveries, including Cesaerian section, less routinized use of medications, fetal monitors, forceps and episiotomies, more acceptance of natural childbirth and "non-violent" Leboyer deliveries, and more time spent with patients by nurse-midwives (than physicians traditionally have) to give answers to questions about child care.

Allocation of Disputes to Alternative Processes

These developments provide a striking parallel to the movement toward greater use of mediation. Suggestions that certain categories of disputes be allocated to informal dispute settlement processes stem in large part from the same concerns that have led to the return of doctor-assisted home births and the development of childbirth centers in which deliveries are assisted by nurse-midwives rather than obstetricians. The assumption is that there are certain categories of disputes and medical happenings in which the need for professional assistance and/or institutional support is the exception. Most cases of debt under $500 and most childbirths are uncomplicated.

But not all. There is, of course, always the chance that a complex legal issue lurks below the surface of a small claim or a marital dispute and that a childbirth can become complicated. It may be that the device used to minimize the possibility of complications in midwife-assisted childbirth in

14. M. Wasserman, "The New Nurse-Midwives," The Progressive, October, 1975 at p. 32: A. Birenbaum, "New Health Practitioners in Primary Care," Intellect, April 1977 at p. 532; J. Foreman, "Taking the Crisis Out of Child Birth," Boston Sunday Globe, July 24, 1977 at p. 55; N. Brozan, "New Childbirth Center: Baby Born in Morning Was Home by Evening," New York Times, March 27, 1976 at p. 30; "Rebirth for Midwifery," Time, August 29, 1977 at p. 66.

childbirth centers—rigorous screening—may offer some protection in the settlement of disputes. The New York City Childbearing Center, for example, will not accept a woman giving birth for the first time who is over 35, women who have experienced irregularities in pregnancy, or women who do not pass comprehensive physical examinations.

Little attention has been paid in the literature to the possible role of screening in the allocation of disputes to alternative processes although screening undoubtedly is done informally by those making referrals. It is not uncommon, for example, for a judge in a dispute involving the appropriation of property to determine, in pre-trial conference, that there is no issue of law involved in the case, and to recommend negotiated settlement on the issue of valuation. Indeed, the judge may, on occasion, suggest a figure which he considers reasonable. Legal aid societies, small claims advisory services, and consumer complaint assistants often serve a screening role in advising clients on which course of action to take in settling a dispute.

But before we get to the screening of individual cases, the decision has to be taken that certain categories of disputes—like childbirth in medical practice—are amenable, in general, to alternative processes.

There are clearly certain categories of disputes for which allocation to less formal methods of dispute settlement causes little concern. If the parties to an intra-family assault or a neighborhood argument over a barking dog are willing to submit the dispute to mediation, it is difficult to argue that they are being denied "due process" and that they and society are being poorly served. Nor can one take issue with the proposition that in most cases involving on-going relationships mediation, with its emphasis on the future rather than the past, may be a better process for settling the dispute than formal adjudication. Moreover, the conversion of a criminal complaint to a civil dispute, through pre-trial diversion, will not in many cases offend one's sense of justice when it is realized that many minor complaints reach the criminal courts because of the propensity of the poor and unsophisticated to use the criminal process instead of the civil process because no legal representation is required in the former.

Once one moves beyond these categories, however, to more general categories of tort, contract and property, and to disputes involving strangers, the problem becomes murkier. It has been argued by a number of commentators, for example, that alternative forums should be available for the settlement of "simple disputes" and disputes involving modest sums. "If the amount of money involved is small, procedural fairness requires much simpler approaches [than adversary proceedings in a court room]. Otherwise dispute settlement consumes the amount in dispute."[15] But defining "simple disputes" is not easy and what may be a relatively small sum to one may be a third or a quarter of another's annual income. Should a plaintiff be denied the assistance of a lawyer or of the full panoply of evidentiary rules of adjudication in a case involving $5,000 but no complex issue of law? Should a plaintiff be denied the assistance of a lawyer and/or formal rules of evidence in a case involving only $1000 but potentially complex issues of fact

15. T. Ehrlich, "Legal Pollution," New York Times Magazine, February 8, 1976 at p. 35.

or law? It may be sobering to consider that the major role of lawyers in litigation is the marshalling and organizing of facts rather than the marshalling of law.

The argument that the small claims court, for example, is merely "optional" to a more formal system of dispute settlement is not an answer to the infirmities of the less formal processes. A party may be effectively cut off from access to the more formal court because the system and society are organized to channel his "small" claim into the small claims court.

One of the reasons that the establishment of special centers for the resolution of minor disputes is so attractive to many concerned individuals is that the choice is often seen as one between expensive and time-consuming proceedings on the one hand and cheap and quick proceedings on the other. For an individual whose annual income is $4000 and who has a dispute with a retailer or manufacturer over the breakdown of a major appliance the appeal of a small claims court or of mediation or arbitration to resolve the case is strong since the poor can neither afford legal assistance nor afford the luxury of waiting for decisions. But the option may be less appealing if the decision maker does not recognize a warranty issue or is prone to compromise decisions.

Once we move away from on-going relationships, torts and contract, the situation becomes even more complex. A former dean of the Stanford Law School cites a report by *Sports Illustrated* that "All over the country little girls have risen up to sue for the right to play in the Little League" and argues, while acknowledging that sex discrimination in Little League baseball is wrong, that "as a matter of sound allocation of judicial resources . . . our courts should stay out of such matters."[16] One wonders whether this conclusion is reached because the claimant or the League is little and whether the same argument would be made if the claimant were black or the League big. With the demise of sandlot baseball, denial of access to the Little League may represent denial of access to economic opportunity. Are we willing to leave the ultimate resolution of the issue of access to a board of mediators or arbitrators, a state legislature, or a town council?

And cross-cultural comparisons are often misleading. It has been argued that "most nations . . . get along with far fewer lawyers than we have. China is the extreme case—only a few thousand lawyers serve 800 million people."[17] But we know very little about the cost of people's courts and comrades' courts in countries like China, Cuba, East Germany and elsewhere in terms of individual freedom and human dignity.

One also has to ask whether easier access to alternative dispute settlement processes for minor disputes will increase litigiousness. This depends in part on how "minor" the dispute is. There is undoubtedly a growing inclination in the United States "to act as if every human problem had a legal dimension."[18] By making arbitration and mediation more accessible, there may develop a tendency to raise the level of minor frustrations to formalized disputes. A young woman enters an antique shop, sees a desk she would like

16. Ibid.
17. Ibid.
18. J. Auerbach, supra note 11 at 38.

and tells the dealer she will return by five o'clock, once she has borrowed money from a friend. She returns at four-thirty and discovers that the dealer is in the process of selling the desk to another customer. Frustrated and upset, feeling that she had some sort of contractual understanding with the dealer, what should the woman do? Some might resign themselves to the situation and say, "That's life—you win a few and lose a few," write a cathartic letter to the dealer or a consumer complaint agency, or take the "dispute" to mediation, arbitration or court. Should society encourage such minor frustrations to be formalized to the level of mediation or arbitration? Is this a useful allocation of society's limited resources?

In confronting the allocation issue—that is, what disputes should be handled by which processes, it should be noted that distinctions among various dispute settlement agencies become much less clear if one views various dispute settlement alternatives not in terms of processes and actors (as typical analyses do) but in terms of results.

It may be that what really distinguishes pure mediation from pure adjudication is the element of compromise. The essence of conciliation and mediation is that the two parties meet each other half way. Neither party is right or wrong. Each shares part of the blame for the eruption of the dispute. If we focus on compromise as the end result, we find it not only in conciliation and mediation proceedings but also in much of what is characterized as arbitration and adjudication. Small claims courts, for example, are often forced, by the very nature of their operation, to issue compromise decisions despite the fact that such courts are, in most instances, adjudicatory. The fact that lawyers and investigators are often not available to ferret out hard evidence and the fact that the judge is unwilling to spend much time on the case because of its modest nature may compel the judge to reach a compromise decision.

Similarly, as suggested above, courts of claim and courts of regular jurisdiction that hear land appropriation cases are often placed in a position of having to arrive at compromise decisions when confronted with conflicting evidence on the valuation of property. The judge has little guidance on the valuation issue other than that presented by the plaintiff's and defendant's appraisers. Indeed, it is not uncommon for judges in such cases to recommend a figure for negotiated settlement in pre-trial conference and to reach a decision close to that figure if the case goes to trial. And it is widely recognized that lower criminal courts make few determinations of guilt or innocence. Rather, many dispositions involve a societal compromise: placing the defendant on probation.

It is important not to obscure the fact that the results of conciliation and mediation on the one hand and arbitration and adjudication on the other frequently do not differ. First, the choice between the two sets of processes is often framed in terms of a choice between due process, truth and exactitude offered by adjudication and arbitration and the something less offered by mediation and conciliation. It may be, in fact, that, even setting aside the argument that the adversary process obscures truth as much as it illuminates it,[19] the distinction is often non-existent. Second, it is important to bring to

19. M. Frankel, "The Search for Truth: An Umpireal View," 123 U. of Pa. Law Rev. 1031 (1975).

the surface the result of compromise decision-making in certain arbitration and adjudication because of its effect on the integrity of the judicial process. Society may prefer tribunals that do not mediate under the guise of adjudication. There is much to be said for the candor of one New York City arbitration agency that calls itself the Jewish Conciliation Board.

What Took Us So Long?

Our highly developed concern with "due process" is, of course, one reason why the United States has taken so long to develop alternative approaches to dispute settlement. And it explains why, at the same time that informal dispute settlement is being explored, there has been a concurrent inflation in the number of law schools, law students and lawyers, and in the development of legal aid and group legal insurance. It also explains the decline in the role of lay judges in the lower criminal courts, even in rural communities.[20]

Due process is seen as the underpinning of adjudication even though that process has long been effectively denied to many citizens. But there are other reasons why it has taken so long to recognize the value of processes that have long played significant roles in other societies. The major fault must lie with the two professions that, in different ways, have until recently monopolized the dispute settlement field in the United States—the anthropologists and the lawyers.

The role of informal dispute settlement in other societies has long been a concern of American anthropologists and much has been written about mediation and arbitration in developing countries. Unfortunately, much of this literature has tended to imply that informal dispute settlement is associated with primitive societies, not urbanized, industrial communities. Anthropologists, until recently, were largely unwilling to draw lessons from studies conducted in other cultures. Moreover, given the strong emphasis placed by departments of anthropology on students conducting field research in primitive or developing societies, legal anthropology within the United States was largely neglected. The impression was given that anthropologists were more concerned with exposing their wizardry with methodology than with relating their findings to societal problems. It was the rare anthropologist—such as Max Gluckman—or the rare lawyer—like Lon Fuller—who suggested that there were commonalities in developed and developing societies that should be explored and that subcultures of dispute settlement analogous to informal dispute settlement in primitive societies may and should exist in the industrialized states. In rare instances an anthropologist such as James Gibbs would describe dispute settlement in a primitive setting in universal terms which brings the reader back to a questioning of what is going on in his own society. A major breakthrough came in late 1975 when Laura Nader, a leading legal anthropologist, put the case for alternative methods for dealing with minor disputes before a meeting of the

20. "The Right to a Legally Trained Judge: Gordon v. Justice Court," 10 Harvard Civil Rights—Civil Liberties Law Rev. 739 (1975); Gordon v. Justice Court, 12 Calif. 3d 323, 525 P.2d 72 (1974); R. Stewart, "Lay Judges Role Limited in Vermont," Boston Globe, Oct. 11, 1976 at p. 40. *But see* North v. Russell, 427 U.S. 328 (1976); Treiman v. State ex. rel. Miner, 343 So. 2d 819 (Fla. 1977).

California State Bar Association. Now informal dispute settlement in the United States is attracting considerable attention from the anthropologists and a very valuable anthropological literature is emerging.

It is, perhaps, too much to have expected the practicing bar to have sponsored dispute settlement processes that minimize the role of lawyers. The American Bar Association, like the American Medical Association, has traditionally resisted reform. Like the Frenchman who, on seeing a crowd of people rush by, dashes from a café announcing, "I must follow them, for I am their leader," the bar has come to the support of alternative approaches to dispute settlement rather late.

More might have been expected from the law schools,but most such schools have, until very recently, carried on as though all disputes are, or should be, settled under the Federal Rules of Civil Procedure.

There are a number of reasons for the failure of law schools to inquire whether there are workable alternatives for the settlement of certain types of disputes in American society. One of the most important has been the almost total reliance, until recently, on the case method of instruction. Not only is the case method itself fostered by adversary proceedings, but the "case" typically is used to shed light on a principle of law, not to expose societal problems in any systematic way. Generations of students have been nurtured in the belief that the law of contracts as taught in the first year is accessible to everyone and that all contract disputes are settled through processes revealed in these cases. Few teachers stopped to ask how many persons were deprived of the opportunity for such resolution or how many solved their contract disputes in other ways.

In some respects, the case method contains within it the same infirmities inherent in the adversary process. In the same way that the adversary process shapes, determines and excludes evidence on the basis of whether it is "relevant" to the hearing, the case reveals only those facts that shed light on the principle of law being exposed. And just as the adversary process excludes evidence which might be critical in exposing the more significant social problem underlying the particular symptomatic problem before the court, so the case typically excludes evidence of social problems that go beyond the narrow issue with which the case is concerned. Non-adversary dispute settlement processes—particularly mediation—permit one to ask not only did the husband assault his wife, but why. Only lately have law schools introduced courses that ask not "what is the law?" but "what are the social problems with which law and lawyers must come to terms?"

Because it had been a tacit assumption in legal and anthropological education that non-adversary, non-adjudicatory processes did not play a very significant role in dispute settlement in urbanized, industrialized societies, the response to demands for reform of the prevailing dispute settlement system was often a call for provision of more lawyers and more courts. Moreover, the failure to recognize the role that alternative dispute-settlement processes have played and could play in the United States has had sometimes tragic results for other societies.

In the period following independence in many developing countries, in the 1950s and 1960s, a number of American lawyers and law teachers were brought to Africa and Asia to assist with the development of law and legal

education. Nurtured in the belief that informal dispute settlement played an insignificant role in their own country, many of these lawyers urged—successfully—the abolition of customary courts (and customary law) on the ground that they were inconsistent with the demands of developed societies.[21] The processes of these customary courts were strikingly similar to the role already being played by informal dispute settlement in the United States in the 1950s and 1960s and the greatly expanded roles being played by conciliation and mediation in the America of the 1970s.

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21. For one view of this phenomenon, see D. Trubeck and M. Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" 1974 Wisc. Law Rev. 1062 (1974).